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Nos. 346 and 347

IN THE

Supreme Court of the United States

October Term, 1939

UNITED STATES OF AMERICA,
Petitioner,

v.

SOCONY-VACUUM OIL COMPANY, INC., ET. AL.,

SOCONY-VACUUM OIL COMPANY, INC., ET. AL.,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

COME NOW the respondents in the above entitled case and respectfully pray that the judgment heretofore entered in the above entitled case be vacated, that the issuance of the mandate thereon be stayed, and that a rehearing be granted, and in support thereof respectfully show:

I.

This Court has held that the District Court for the Western District of Wisconsin had jurisdiction to try these

respondents. The decision rests squarely upon the following conclusion:

> "* * * As we indicated in our discussion of the buying programs, there was sufficient evidence to go to the jury that the conspiracy did not end with an agreement to make purchases on the spot market; that those buying programs were but part of the wider stabilization efforts of respondents; that the chief end and objective were the raising and maintenance of Mid-Western prices at higher levels. * * * Accordingly, successful consummation of the conspiracy necessarily involved an understanding or agreement, however informal, to maintain such improvements in Mid-Western prices as would result from the purchases of distress gasoline. The fact that that entailed nothing more than adherence to prior practice of relating those prices to the spot market is of course immaterial. * * *" (Opinion, p. 66.)

The decision is thus based upon the premise that successful consummation of the conspiracy "necessarily involved" an agreement to adhere to prior practices in selling to jobbers and at retail in the Western District of Wisconsin.

As the respondents pointed out in their original brief they do not believe that any such agreement was proved. For the purposes of this petition, however, we will assume that (1) the jury found such an agreement, and (2) there is evidence in the record from which such a finding may be inferred. But after conceding this, the inescapable fact remains that Government counsel, both in pleadings and in admissions made prior to the close of the Government's case, not only conceded but stated affirmatively that there

was no charge of an agreement to adhere to prior practices in selling to jobbers and at retail. The respondents relied upon these disclaimers. They made no attempt, and in view of the disclaimers there was no necessity of attempting, to disprove such an agreement by evidence.

1. *The Government specifically disclaimed any charge of an agreement to adhere to prior practices with respect to the prices to be paid by jobbers.*

These concessions were made in response to repeated questions of counsel for the respondents, who were acutely aware of the importance of the issue in connection with the matter of jurisdiction and endeavored to make the matter clear even before the trial sta ted. It will be recalled that Paragraph 11 of the indictment alleged that the contracts which the respondents customarily employed in making gasoline sales to jobbers related the selling price to the published spot market price. In order that there would be no misunderstanding counsel for the respondents addressed the following question to Government counsel during the argument on their demurrers:

> "Is it your contention that it is stated anywhere in this paragraph, or anywhere in the indictment, that the defendants agreed among themselves that they would sell to the jobbers only at the average spot market price that you have described?"

Counsel replied:

> "Mr. Chaffetz: That question touches upon the question that Colonel Donovan propounded in the course of his argument yesterday, and I had intended to deal with that specifically.

"I will state now that this paragraph does not intend to charge, and does not charge that the defendants agreed together to do business only on the basis of this contract. The contract, the substance of it, is set forth in Paragraph 14.

"Col. Donovan: Thank you very much. You won't mind if we take up also whether you think that charge is made here, Mr. Chaffetz?

"Mr. Chaffetz: No, I will stand by that. I don't think that charge is made in this indictment.

"Col. Donovan: It is not made in this indictment?

"Mr. Chaffetz: Not in this indictment, that is right.

"Mr. Lewin: It is charged as an overt act later—not the fact that they made the uniform pattern, but that they sold on that basis.

"Mr. Chaffetz: I stand on my statement, which is that this indictment nowhere charges that the defendants agreed to do business only on this contract, the substance of which is set forth in Paragraph 11.

"Col. Donovan: But the answer to my question is that it is not your contention that they agreed among themselves to sell only at the spot market price which you have described in Paragraph 11?

"Mr. Chaffetz: I think I will stand by the response that I made.

"Col. Donovan: Yes. I just wanted to be sure. Thank you very much" (R. 56).

Thereafter, and prior to the trial, the respondents sought and obtained a bill of particulars from the Government. In that bill it is stated explicitly:

"(8) In response to the demand in said motions:

> "Whether it is claimed that the defendant entered into an agreement not to sell to jobbers except in accordance with 'the prevailing form of jobber-contract described in Paragraph 11'?
>
> "The Government does not claim that each defendant 'entered into an agreement not to sell jobbers except in accordance with' the contract described in Paragraph 11 of the Indictment." (R. 66)

The respondents were not even content with this. During the course of the trial they demanded further clarification of the charge against them and were advised that:

> "There is no charge in the indictment, and counsel has stated it repeatedly during the trial, there is no charge in the indictmenf of an agreement with respect to these contracts." (R. 296)

Thus it is clear that prior to the commencement of the respondents' case they were advised that the Government would not press any charge that the respondents had agreed to adhere to their prior practices of contracting to sell to jobbers on the basis of spot market prices.

2. *The Government also specifically disclaimed any charge of an agreement with respect to the prices to be charged to retailers.*

The evidence shows without contradiction that Standard Oil Company (Indiana) was the market leader in this area and that when it posted its price none of the respondents could sell at a higher price. In this connection Government counsel made the following statements:

> "• • • We didn't say that the Standard of Indiana, when it posts a retail price, first consults with

the other companies to find out what retail price should be posted" (R. 2308).

"If that is what you are worrying about, if you think we are charging you with sitting around a table and agreeing on a uniform retail price, don't worry, because that isn't what we are charging" (R. 2295).

Thus it is clear that the Government specifically disclaimed any charge of an agreement to adhere to prior practices of following the posted price of Standard of Indiana.[1]

3. *The Government's true position, as stated at the time when they were construing the indictment in the argument on the respondents' demurrers* (R. 54-61), *was that it would establish jurisdiction by proving that the market journals had published the prices which the respondents*

[1] It is significant that the indictment fails to charge a retail "price fixing agreement." Paragraph 18, the charging paragraph of the indictment, specifically alleges that the "defendants have artificially raised and fixed such spot markets for tank car prices of gasoline and have maintained such prices on artificial and non-competitive levels" (R. 12). No such charge is made with respect to prices in Wisconsin. The only charge made is that the defendants "have arbitrarily, by reason of the provisions of the prevailing form of jobber contracts above described in paragraph 11, exacted large sums of money from thousands of jobbers with whom they have had such contracts in said Mid-Western area (including the Western District of Wisconsin), and in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area (including the Western District of Wisconsin). In so doing, defendants have then and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline among the several states of the United States in violation of Section 1 of the Act of Congress of July 2, 1890, known as the Sherman Anti-Trust Act" (R. 13). Even had there been no disclaimer it is clear that there is no charge in the indictment of an agreement to fix and maintain retail prices.

had agreed to pay under the buying programs, and that as a result of such publication the respondents' customers had been forced to pay fixed, agreed-on prices in the Western District of Wisconsin. According to their own interpretation of their indictment this was the only charge of activities in the Western District of Wisconsin which the respondents were called upon to disprove. Relying upon these statements of the Government's position, the respondents introduced no evidence to disprove an agreement to adhere to prior practices in selling to jobbers and at retail.

Thus the question of whether there was an agreement to adhere to prior practices was specifically eliminated from the trial. It was raised for the first time in the appellate courts. We respectfully submit that a rehearing will demonstrate that the ends of justice demand that this Court order a retrial in order that the respondents may be afforded an opportunity to submit evidence on this issue.

II.

This is a criminal case. Under the Constitution the respondents were entitled to have every issue of fact determined by the verdict of the jury. We respectfully submit that a re-examination of the record will demonstrate that the charge did not submit to the jury the question of whether the respondents had engaged in "a combination to fix prices" as such a combination is defined in this Court's opinion.

The opinion seems to hold that concerted action is not to be condemned as a price-fixing combination merely because it has the incidental purpose or effect of raising prices. It must have *the direct and immediate* purpose or

the direct and necessary effect of raising prices. In fact, this Court repeatedly distinguished cases in which the incidental effect of the combinations involved was to raise prices on the ground that price raising was not the direct and immediate purpose of those combinations.

Thus, in *Appalachian Coals, Inc.* v. *United States*, "* * * the court below found, that while defendants could not fix market prices, the concerted action would 'affect' them, that is, that it would have a tendency to stabilize market prices and to raise them to a higher level than would otherwise obtain" (288 U. S., at 373). This Court, however, distinguished the *Appalachian* case from the case at bar, saying:

> "* * * In the instant case there were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of prices to jobbers and consumers in the Mid-Western area, by the elimination of distress gasoline as a market factor. * * * Unlike the plan in the instant case, the plan in the *Appalachian Coals* case was not designed to operate *vis a vis* the general consuming market and to fix the prices on that market. Furthermore, the effect, if any, of that plan on prices was not only wholly incidental but also highly conjectural * * *" (Opinion, p. 38).

Similarly, in the *Maple Flooring Manufacturers* and *Cement Institute* cases, the courts below found, and this Court sustained their conclusion that—

> "* * * the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uni-

> formity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. * * *'' (268 U. S., at 582; see *ibid*, 603, 604.)

This Court in the instant case, however, distinguished those cases on the ground that—

> ''* * * the systems there under attack were methods of gathering and distributing information respecting business operations. It was noted in those cases that there was not present any agreement for price-fixing * * *'' (Opinion, p. 39).

The *Chicago Board of Trade* case involved—

> ''* * * a rule or agreement by which men occupying positions of strength in [a] branch of trade, fixed prices at which they would buy or sell during an important part of the business day, * * *'' (246 U. S., at 238).

This Court in the instant case distinguished that case, saying:

> ''* * * Since it was not aimed at price manipulation or the control of the market prices and since it had 'no appreciable effect on general market prices,' the rule survived as a reasonable restraint of trade'' (Opinion, p. 39).

If the purpose of a combination is to be determined merely from the fact that it has an incidental effect upon prices, this Court in reaching its decision would have been compelled to overrule the cases just referred to. But this Court did not overrule these cases. Instead it placed its

decision upon the ground that they did not involve a "direct purpose and aim" to raise prices. The actual decision of the Court therefore seems to imply that something more than an intention presumed from the incidental effect of the combination is required. There must be a "direct purpose and aim" to raise prices.

Let us apply the principles which this Court thus enunciated in its opinion to the facts of the instant case.

The facts of this case would have permitted the jury to draw either of two inferences:

1. *The jury could have concluded that the respondents had the "direct purpose and aim" of raising prices.*

This Court specifically held that there was sufficient evidence on this point to go to the jury. It said:

> "* * * The conclusion is irresistible that defendants' purpose was not merely to raise the spot market prices but, * * * to raise the price of gasoline in their sales to jobbers and consumers in the Mid-western area * * *. Certainly there was enough evidence to support a finding by the jury that such were the scope and purpose of the plan." (Opinion, pp. 19-20.)

> "* * * As we indicated in our discussion of the buying programs, there was sufficient evidence to go to the jury that the conspiracy did not end with an agreement to make purchases on the spot markets; that those buying programs were but part of the wider stabilization efforts of respondents; that the chief end and objectives were the raising and maintenance of Mid-Western prices at higher levels. * * *" (Opinion, p. 66.)

2. *The jury, however, was not compelled to make the finding for which this Court found "sufficient evidence to go to the jury." Instead the jury could have found (1) that distress gasoline constituted a competitive evil; (2) that the respondents' direct and primary purpose was to purchase distress gasoline; (3) that the agreement among them ended with such purchases; and (4) that any effect which such purchases had upon the spot market or upon prices in the Mid-Western area was wholly incidental.*

In short, the jury could have accepted, as a fair description of the plan, the testimony of McDowell, who said:

> "After we got through with all this talk pro and con, some one asked Mr. Ashton to sum up just what his suggestion was. Mr. Ashton said that there were to be no pools or no central buying agencies; that the suggestion would be that every one buy in line with his needs, and make his own deals with the selling refiners; second, that there were to be no allocations, no commitments, no percentage quotas, such as there had been in some of the previous plans, but that each company would buy in line with his actual needs; third, that the Committee would urge and suggest to the buying companies that they consider paying a fair going market price in their individual transactions, rather than chiseling down on an already distressed price" (R. 1184).
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> • • •
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> "• • • we felt there were some 10 or 12 companies who were regular and normal purchasers of gasoline, and that this Committee might attempt to put these purchasers in touch with the sellers, for the purpose of giving these independent refiners an outlet that already existed for their distress gaso-

> line. These major companies were buying gasoline and had to buy gasoline, and, as I tried to explain, they had been buying it from just a few companies. Our plan contemplated trying to get them acquainted with some of the smaller and lesser known independent refiners" (R. 1218).

As shown in Appendix "A" to our original brief, there was abundant evidence tending to establish that there was no curtailment in the market supply; that the respondents would have purchased the same amount of gasoline regardless of the existence of a buying program (Appendix "A," 216-41); and that the market was at all times subject to all of the influences of normal competition (*Ibid.*, 243-73).

In its opinion, this Court rejects the direct testimony of McDowell and others and alludes to certain evidence concerning the conduct of the buying program which, it implies, might overcome any declarations of the defendants and might establish a primary intention to raise prices. It states that buying orders were "timed" and strategically placed; that sellers were "assigned" to buyers so that the market would not be depressed, and that "as a result of the payment of fair going market prices a floor was placed and kept under the spot markets" (Opinion, p. 41). But such characterizations of the respondents' activities are themselves a matter of inference and conclusion. As shown in the Appendix "A," there was abundant evidence tending to show that the only things which determined whether a purchase was to be made from a particular refiner or at a particular time were (1) whether the buyer actually needed the gasoline, or was assured of needing it in the near future; and (2) whether the refiner from

whom he purchased had distress gasoline on his hands (Appendix "A," 110-22). There was also evidence to show that the distress character of gasoline could be determined entirely without regard to price. It was gasoline which the refiner had been forced to manufacture (*Ibid.*, 195-202), gasoline which he had no place to store (*Ibid.*, 203-6), and gasoline for which he could not expect to have any customers (*Ibid.*, 207-12).

The same thing is true of the conclusion of this Court that a "floor was placed and kept under the spot markets" by the payment of fair going market prices. The conclusion of this Court might not have been the conclusion of the jury. This Court assumes that the respondents agreed to purchase any gasoline which would not bring the market price. There was abundant evidence to support a finding that no such agreement existed and that the respondents offered no resistance whatsoever to any natural tendency there might have been for the market to decline (Appendix "A", 122-35). In fact, when the market did decline in November and December 1935, and in February 1936, the respondents' purchases were made at correspondingly lower levels (Def. Exs. 1024 and 713; R. 3807 and 3177).

There is no evidence in the record which cannot be interpreted as being consistent with this view of the buying program. And even if there were, *it would be for the jury, not for this Court, to make the interpretation, and to determine which view as to the purpose and effect of the buying program was to be accepted.*

We respectfully urge that the instructions of the trial court did not submit to the jury the question whether the direct and immediate purpose or effect of the combination

was to raise prices.[1] It is true that the trial court instructed the jury to return verdicts of guilty if it found

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[1] In its opinion this Court refers to a portion of the charge which, it says, required the jury to find beyond a reasonable doubt "that the price rise and its continuance were 'caused' by the combination and not caused by" certain other factors (opinion, pp. 34, 41).

The instruction referred to reads as follows:

> "Now, unless you find from the testimony and believe beyond a reasonable doubt that the said price increase, and its continuance at the level shown by the evidence was caused by an unlawful agreement or combination of the defendants, as alleged in the indictment, and as heretofore defined and explained to you, and not caused by the factors aforesaid, then it is your duty to acquit the defendants and to return verdicts of 'not guilty'" (R. 2407).

This instruction, however, flatly condemns the price rise if brought about by a combination "as heretofore defined and explained to you." The charge had previously condemned any combination having the purpose to raise prices. But the jury was instructed that the respondents were chargeable with intending to raise prices if such were the "natural and probable" result of the combination. Thus, the charge referred to in the opinion of this Court merely perpetuated the general charge which condemned as *per se* illegal any combination having the natural and probable tendency to raise prices.

But this was not all. The jury was merely required to find that the natural and probable consequence of the combination was to contribute in some degree to an increase in prices. For, the trial court also instructed the jury:

> "You will also understand that if you find an illegal combination to have existed among all or some of the defendants, having for its purpose the raising of prices, it does not matter that there may have been also other factors which contributed to the raising of the prices, as, for example, the existence of the Connally Act, * * *" (R. 2405).

that the respondents had combined "to raise" the price of gasoline. It also instructed the jury that it must find that the respondents had "intentionally raised and fixed the tank-car price of gasoline * * *." These instructions, however, did not require the jury to find that the respondents had a "direct purpose and aim" to raise prices. Instead, the jury was instructed:

> "*Every person is presumed to intend the natural and probable results of his acts knowingly done*, and an unlawful act implies an unlawful intent. If a defendant knowingly did acts which the law renders illegal, then he is guilty, irrespective of whether he believed he was violating the law" (R. 2416; italics supplied).

Thus it is clear that the jury was *not* required to find that the direct and main purpose of the combination was to raise prices. It was sufficient if the jury believed that *the natural and probable consequence* of purchasing distress gasoline was to raise prices to any extent.

In fact, the trial court specifically refused to submit to the jury the very question which this Court deems of basic importance, viz.: What was the primary and direct purpose and the direct and necessary effect of the respondents' activities? The respondents specifically requested an instruction which, if granted, would have required the jury to find whether their primary purpose was to purchase distress gasoline or whether it was to raise prices. That requested instruction (the refusal to grant which is Assignment of Error No. 46) reads as follows:

> "It is not the purpose of the Sherman Anti-Trust Act to make impossible the normal and fair

conduct of interstate commerce through the adoption of reasonable measures to protect interstate commerce from injurious and destructive practices and thus to promote competition on a sound basis. The evidence in this case is such as to justify you in finding and concluding that injurious and destructive practices existed in the oil industry in connection with the marketing of tank car gasoline.

If, from the evidence as a whole you conclude that a reasonable theory or explanation of the conduct of defendants is that they adopted and carried out a buying program or programs consisting of reasonable measures *to protect interstate commerce from injurious and destructive practices and thus to promote competition on a sound basis*, you must find the defendants not guilty even though you should conclude that *an incidental result* of defendants' activities was to contribute to the rise of the tank car and retail prices for gasoline, shown by the evidence.

In this connection you are instructed that you may find that the dumping of surplus gasoline by independent refiners at distress or sacrifice prices under the circumstances disclosed by the evidence in this case was an injurious and destructive competitive practice, in that, you may find from the evidence that:

(1) It hindered federal and state efforts to conserve the limited supplies of crude oil in the United States;

(2) It hindered and stood in the way of the reasonable stabilization of the oil industry;

(3) It tended to eliminate the independent refiners as a competitive element in the industry;

(4) It hindered the attainment of the objectives of the National Industrial Recovery Act, including relief of unemployment and maintenance of wages at fair levels" (Defendants' requested instruction No. 92, R. 2381, italics supplied).

We respectfully submit that the respondents are entitled to have a rehearing on the question of whether the jury was in fact required to find that their primary purpose was to raise prices. This question was not argued in the original briefs of the respondents or the Government, or in the oral argument before this Court for the reason that the Government in its brief took the position that the charge required the jury to find more than an intention to raise prices—that it required it to find an agreement to charge an agreed-on price, such as was involved in the *Trenton Potteries* case (Govt. Brief, 62-66, 74-75). Since the opinion of this Court rejects that view of the Government and makes the entire case rest upon the question of the respondents' primary purpose, that issue should be briefed and argued.

III.

Our discussion under Point II above assumes that this Court condemned the combination in this case on the theory that the jury found that the direct primary purpose or effect of the combination was to raise prices. In fact, however, the opinion has been widely construed as holding that any concerted effort to deal with what this Court has here-

tofore recognized as "competitive evils" is illegal *per se* once it is shown that the natural and probable consequence of the concerted effort will be to raise prices.[1]

The effect of such a change in the law would be far-reaching.

A "reasonable arrangement" among competitors to end a price war would certainly have the effect of raising the price of a commodity. Yet this Court in the *American Tobacco* case used such a combination as an illustration of a reasonable restraint which the Act did not prohibit.[2]

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[1]This view appears to be based on the following language in the opinion:

"* * * That other factors also may have contributed to that rise and stability of the markets is immaterial. For in any such market movement, forces other than the purchasing power of the buyers normally would contribute to the price rise and the market stability. So far as cause and effect are concerned it is sufficient in this type of case if the buying programs of the combination resulted in a price rise and market stability which but for them would not have happened. For this reason the charge to the jury that the buying programs must have 'caused' the price rise and its continuance was more favorable to respondents than they could have required. *Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise is proof of the actual consummation or execution of a conspiracy under §1 of the Sherman Act*" (opinion, p. 41; italics added).

"Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*" (opinion, p. 44).

Since, in the instant case, the only purpose to raise prices which the jury was required to find, was one based upon the natural and probable consequences of respondents' acts, this language suggests that the test need not be "primary purpose or aim" but merely indirect and incidental effect.

[2]221 U. S. 106, 177 (1911).

A combination of competitors in a depressed industry to pool and disseminate information as to past prices, production and inventories has the natural and probable consequences of stabilizing market prices at higher levels. Yet in the *Cement* and *Maple Flooring* cases this Court rejected the argument that such a combination was illegal solely because in its operation it "necessarily affects prices."[1]

A combination to freeze the market price of a commodity between sessions of an exchange certainly has the natural and probable effect of stabilizing the price of a commodity. Yet such a combination was held lawful in the *Chicago Board of Trade* case.[2]

A combination of competitors which eliminates competition between them and removes the depressing effect of distress sales on the market also has the natural and probable effect of raising prices. The trial court in *Appalachian Coals, Inc.* v. *United States* made a specific finding to that effect.[3] Yet the combination was sustained.

These cases are all based on a fact of common knowledge, viz: that the competitive system itself sometimes

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[1]268 U. S. 563, *ibid*, 588 (1925).

[2]246 U. S. 231 (1918).

[3]288 U. S. 344, 373 (1933). The finding in question reads as follows:

> "That the effect of the plan of defendants will be to eliminate free competition among a large group of producers of coal and substitute for same concerted action on their part in the offering of their product at uniform prices; and that, because they control so substantial a part of the coal sold in the United States this elimination of competition and concerted action will affect market conditions, and have a tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition. The defendant will not have monopoly control of any market, nor the power to fix monopoly prices." (*Appalachian Coals, Inc.* v. *United States, supra*, Transcript of Record, vol. I, pp. 217-8.)

destroys competitive equality by creating scarcities or surpluses or other derangements. These derangements subject buyers or sellers to inflated or depressed prices in as arbitrary or extreme a way as any monopoly could do. Sometimes such derangements become chronic. This Court has hitherto proceeded on the theory that concerted action may mitigate or tend to prevent such situations and that when concerted action preserves what Mr. Justice Brandeis described as "all that is worth preserving in competition,"[1] it does not constitute an unreasonable restraint of trade. It has also proceeded on the theory that the processes of voluntary cooperation might function more effectively in the public interest than legislative process.[2]

To abandon this doctrine would be to condemn most of the activities of trade associations which this Court and the Federal Trade Commission have previously approved merely because the natural and probable effect of such activities is to stabilize prices and to mitigate their chronic depression or their run-away advances.

The effect of such a change is particularly important at the moment. We are confronted by the dislocations of a war program with the consequent destructive effects of scarcity on prices. Are buyers to be foreclosed fron all concerted action which would protect them from run-away prices which the derangements of competition inevitably threaten? Are sellers to be foreclosed from concerted action to mitigate such situations which consideration of the public need dictates? Was the Secretary of Commerce,

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[1] *American Column & Lumber Co.* v. *United States*, 257 U. S. 377, 417-8 (1921).

[2] See *Appalachian Coals, Inc.* v. *United States*, *supra*, at 374.

when he reported to the President and Congress in 1922 that the producers in the coal industry had saved consumers millions of dollars by concerted action to check run-away prices in an acute shortage, merely advertising the commission of a crime in which he was *particeps criminis* through the encouragement he had given?[1]

In their brief and in their oral argument the respondents assumed that the cases referred to above represented the existing law, and that a plan whose direct purpose and aim is to remove a competitive evil is not condemned merely because it incidentally results in fairer or higher prices. Nor did the Government attack this doctrine: on the contrary it attempted to show that the trial court had applied it in framing its charge. If the opinion does in fact repudiate this doctrine, and if the preexisting law is to be discarded, then we respectfully submit that this Court should order a rehearing in order that the nature, wisdom and effect of such a change in the law may be fully briefed and argued.

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[1]See Tenth Annual Report of the Secretary of Commerce (1922), pp. 8-10.

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I certify that this petition is presented in good faith and not for delay.

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